71-5025

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. A-112

JOHN EMANUEL PANZAVECCHIA,

Petitioner

vs.

UNITED STATES of AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JOHN EMANUEL PANZAVECCHIA, your Petitioner, respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgments of said Court entered in Case Number 30044 on the 28th day of May, 1971 and the 2nd day of July, 1971 (denying Rehearing).

OPINIONS BELOW

FIFTH CIRCUIT. The opinion of the Court below in this case (Appendix A, infra) and the decision on Petition for Rehearing (Appendix B, infra).

The opinion of the Court below in Case Number 27322 (Appendix C infra).

DISTRICT COURT. The order of the District Court from which the Appeal in this cause was taken and the order of the District Court from which appeal was taken in Case Number 27322 (Judgment of conviction and sentence as to Count one and Two and Judgment of Acquittal as to Count Three Appendix D infra).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A, infra) was entered on the 28th day of May, 1971 and a timely Petition for Rehearing was denied on the 2nd day of July 1971. The jurisdiction of this Court is invoked under 28 U. S. Code Sec. 1254 and Rule 37(b) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

The Petitioner was indicted under Case Number 68-92 (Appendix E, infra) and found guilty as to Counts One and Two and acquitted as to Count Three (Appendix D, infra) in

the District Court. On appeal in Case Number 27322 (Appendix C, infra) the United States Court of Appeals Fifth Circuit reversed the decision of the District Court. Subsequently the Petitioner was reindicted under Case Number 70-23 (Appendix F, infra) and was found guilty as to Count Two and acquitted as to Count One. The indictments in each case were iddentical with the exception that in the latter case the name of a store was inserted, the owners of which testified almost identically in both cases.

Further, the Appellate Court in this cause, in affirming the Lower Court considered evidence of a crime for which the Petitioner was found not guilty. The questions thus presented are:

1...Whether the Petitioner was charged with an offense and found guilty of same for which he has previously been placed in jeopardy.

2...Whether the Appellate Court in affirming the decision of the Lower Court can consider evidence of a crime for which the Petitioner had been found not guilty.

STATUTORY PROVISIONS INVOLVED

The applicable statutary provisions involved are the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

This cause arose initially from the filing of an indictment under Case Number 68-92 in the United States District Court for the Southern District of Florida charging Three Counts, each for passing and uttering certain counterfeit obligations of the United States in violation of Title 18 U. S. C., Sec. 472 (Appendix E, **infra**). In that indictment it is to be observed that all Three Counts were absolutely identical in wording, down to the last punctuation mark, and completely indistinguishable. Subsequently that cause was tried by jury which returned its verdict finding the Petitioner guilty as to Counts Three (Appendix D, **infra**), The Petitioner appealed the findings of guilty as to Counts one and two in Case Number 27322 in the United States Court of Appeals for the Fifth Circuit and that Court reversed the judgments of guilty (Appendix C, **infra**).

Subsequently thereto a new indictment was filed charging the Petitioner with two Counts of passing and uttering certain counterfeit obligations of the United States in violation of Title 18 U. S. C. Sec. 472 under Case Number 70-23 (Appendix F, **infra**). This cause was tried by a jury and the jury returned its verdict finding the Petitioner not guilty as to Count one and guilty as to Count two. The petitioner appealed the finding of guilty as to Count two in Case Number 30044 in the United States Court of Appeals for the Fifth Circuit and that Court affirmed the judgment of guilty (Appendix A, **infra**).

The same witnesses testified in both cases and the evidence was substantially the same. In this latter case a MR. IRIS testified that he received a $10.00 bill from the Petitioner and took the said bill to the bank and gave it to a MR. BILLOW. MR. BILLOW did not testify. However there

was testimony from a MR. HARLAN an officer from the bank, that he received a $10.00 bill from a MR. BILLOW. That he, MR. HARLAN did not see MR. IRIS give the said note to anyone nor did he see MR. IRIS in the bank and could not truthfully say of his own knowledge that the said $10.00 bill was presented to the bank from IRIS DRUGS. The said $10.00 was permitted over objection to be introduced into evidence. It is this notion upon which the the Petitioner was found guilty.

REASONS FOR GRANTING THE WRIT

The issues presented in this Petition concern the United States Constitutional rights and guarantees of the Petitioner. The decision of the United States Court of Appeals for the Fifth Circuit violates these rights as guaranteed in the Fifth and Fourteenth Amendments to the United States Constitution relating to Double Jeopardy and due process of law and is in conflict with decisions of this Court and other United States Court of Appeals.

The Petitioner was originally tried upon an information composed of Three Counts, each Count being identical to the other. At that trial the Petitioner was found Not Guilty as to Count Three.

An appeal as to the finding of guilt on the remaining two counts resulted in a reversal of the judgment of guilty. By way of a new indictment the Petitioner was retried on two Counts and found not guilty on Count one and guilty on Count two. An examination of Count three of the old indictment and an examination of Count two of the new indictment will show that both are identical in each and

every respect with the exception that in the second indictment the allegation "at IRIS DRUGS" was added. The witnesses in the second trial were the same as those in the first trial. MR. IRIS testimony was essentially the same both times.

The Federal Courts recognize that the guarantee against double jeopardy is grounded in the concept of due process of law and is fundamental to the American Scheme of Justice. Will v. United States, 389 U.S. 90, 88 S. Ct. 269 (1967): Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056 (1969).

A Seventh Circuit Court of Appeals has clearly defined 'double jeopardy' as follows: "Offenses are not the same for purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct; they are the same only when the evidence required to support the conviction upon one of them (the indictments) would have been sufficient to warrant a conviction upon the other." United States v. Bruni, 359 F. 2d 807 (1966).

This Court has considered the Constitutional guarantee against Double Jeopardy, as provided by the Fifth Amendment of the Constitution of the United States and, in Gavieres v. United States, 220 U.S. 338, 31 S. Ct. 421, 422 (1910) set forth the test for double jeopardy in the following language: "A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other...A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

In the case-at-bar, there is no issue as to there being two separate violations of law as the Petitioner was charged with violating the same law in each instance. Furthermore, the exhibits and testimony, as well as the fact that the same witnesses testified, show that the same facts could convict under the count which Petitioner has been acquitted in the old Indictment as under the count upon which he now stands convicted. Clearly, a more patent example of double jeopardy would be difficult to find. It tramples upon the Petitioner's constitutional right to not be twice placed in jeopardy for the same offense.

The position taken by the United States Court of Appeals for the Fifth Circuit manifests a flagrant repudication of the hearsay rule.

The rule excluding hearsay evidence is based on the lack of opportunity to test by cross-examination the veracity and accuracy of the statement offered. This rule is basic, rather than technical. The reason for the rule is that the unsworn statement of a person not called as a witness or subjected to the test of cross-examination is not recognized as having sufficient probative effect to raise an inference that the fact is as stated. Superior Engraving Co. v. N.L.R.B., CA; 183 F. 2d 783.

Count Two of the Indictment of which the Petitioner stands convicted alleges that he passed and uttered a certain counterfeit note. MR. IRIS, the man to whom the note was allegedly passed never identified the said note and there is no testimony that the note introduced into evidence is the note given to MR. IRIS.

The United States Court of Appeals for the Fifth Circuit, in its opinion sought to be reviewed states as follows: "Counsel for the defendant contend that HARLAN did not

personally see IRIS give the Ten Dollor Note to BILLOW, and that HARLAN's testimony that BILLOW told him that IRIS brought such note to BILLOW was hearsay. Of course, it was hearsay." Yet in spite of this they discuss testimony pertaining to Count One, the Count wherein the Petitioner was fodnd not guilty and then further state in their opinion,"In view of those facts and the fact that BILLOW received only the one note and other surrounding facts and circumstances, it is a reasonable inference that the single note BILLOW initialed and turned over to HARLAN was the note he received from IRIS.

The violation of the hearsay rule and the permitting of a conviction to stand on hearsay evidence is a violation of the due process clause of the United States Constitution.

CONCLUSION

The decision below is palpably erroneous. It violates the constitutional guarantees of the Petitioner and ignores the basic issues basing its decision upon unwarranted generalities. For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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